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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-872

THE ADMIRAL CORPORATION,
Petitioner,

vs.

ZORA H. GILLHAM,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the district court has not been reported. It appears at page 1a of the appendix to the petition.

The opinion of the Court of Appeals for the Sixth Circuit, dated September 25, 1975, reversing the district court's order, is reported at 523 F.2d 102, and appears beginning at page 10a of the appendix to the petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

There are no constitutional provisions arguably involved. The only statutory provision involved is 28 U.S.C. § 1254 (1). The only regulation involved is Rule 19.1. (b) of the Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Did the Court of Appeals correctly decide there was sufficient evidence in the record to support the jury's conclusion that petitioner's conduct relative to a known fire hazard in its Admiral color television sets justified exemplary damages and attorneys' fees?

STATEMENT OF THE CASE

Zora H. Gillham (the respondent herein) brought this action in the United States District Court for the Southern District of Ohio against petitioner, The Admiral Corporation (Admiral), seeking compensatory and exemplary damages for severe burns and serious complications resulting therefrom caused by a fire which erupted in her Admiral color television set in her home in Cincinnati, Ohio, in November 1968. The district court had jurisdiction because of diversity of citizenship between the parties and claims in excess of $10,000 exclusive of interest and costs (app. 11a).[1]

The district court ordered that the issues of liability and the amounts of damages be tried separately, pursuant to Rule 42 (b) of the Federal Rules of Civil Procedure. A

[1] Appendix references herein are to the appendix to the petition for certiorari.

jury trial of these matters was conducted before the Honorable Carl B. Rubin, District Judge, in December 1973. The jury found The Admiral Corporation liable for Mrs. Gillham's injuries. Her claims for compensatory and exemplary damages were then presented to the same jury. The court permitted the question of exemploary damages to go to the jury despite Admiral's motion for a directed verdict denying such dagames. The jury awarded compensatory damages of $125,000, exemplary damages of $100,000, and attorneys' fees of $50,000 (app. 11a).

The district court then granted Admiral's motion for judgment notwithstanding the verdict and vacated the award for exemplary damages and attorneys' fees. In the order granting Admiral's motion, the trial court found that "[t]he evidence can reasonably be interpreted to indicate that [Admiral] was . . . grossly negligent in its design of the television set, in its subsequent activities, and in its failure to warn customers of the potential fire hazard." (app. 2a).

Respondent appealed the district court's order to the Court of Appeals for the Sixth Circuit. The Court of Appeals held that the district court erred in granting the judgment n.o.v. After a thorough and detailed analysis of the evidence, the Court of Appeals stated:

> Therefore the question before us is whether no reasonable person, viewing the evidence in the light most favorable to Mrs. Gillham, and drawing all reasonable inferences in her favor, could find that Admiral's conduct was so intentional, reckless, wanton, willful, or gross that an inference of malice could be drawn. We conclude that the evidence, viewed in light of this standard, was sufficient to permit a reasonable person to conclude that Admiral knew that its design posed a grave danger to the lives and property of its customers, and therefore that its failure to re-

design the set or warn the public was conduct sufficiently intentional, reckless, wanton, willful, or gross to permit a reasonable inference of malice (app. 21-22a).

It is this conclusion of the Court of Appeals for the Sixth Circuit, and the order of judgment based thereon, which petitioner seeks to have this Court review.

REASONS CERTIORARI SHOULD NOT BE GRANTED

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT ADMIRAL INTENTIONALLY, WILLFULLY AND KNOWINGLY EXPOSED ITS CUSTOMERS TO A GRAVE DANGER TO LIFE AND PROPERTY AND THAT THE JURY AWARD WAS THEREFORE JUSTIFIED UNDER OHIO LAW.

Petitioner urges that under Ohio law its conduct should not have been found by the jury and the Court of Appeals to have been malicious, but petitioner purposefully avoids alluding to the evidence, or to its conduct toward the respondent and other members of the public. The Court of Appeals devoted much of its opinion to a detailed analysis of the evidence regarding Admiral's conduct, because, as that Court correctly stated, the question before it was whether the evidence justified the jury's verdict. We will not repeat that Court's analysis, but will summarize Admiral's behavioral pattern with reference to Mrs. Gillham.

As the Court of Appeals noted, "The facts are not disputed." (app. 12a). "Admiral, although apparently conceding that its actions were reprehensible, argues that the

district court was correct in refusing to permit the award of punitive damages to stand." (app. 19a).

The fire which inflicted Mrs. Gillham's injuries originated in the defectively designed high voltage transformer in her color television set. Admiral's designer of that transformer admitted that when he designed it he anticipated that it might catch fire in customers' homes. Admiral's own heat tests showed that the transformer subjected its paper and wax insulation to temperatures higher than those recommended, which created a fire hazard. Admiral therefore enclosed the transformer in a cage, but the cage had ventilation holes and a top held with plastic rivets. The cage would not and did not contain fires, and Admiral knew this. Beginning in October 1964, reports of fires in customers' homes were made to Admiral in a steady stream so that by November 1968, when Mrs. Gillham's set burned, at least 91 such fires had been reported to Admiral. Many of those fires involved personal injuries and property damage. Two years before Mrs. Gillham's fire an Admiral engineer tested 16 similar transformers, all of which burned, and he wondered . . . "that more failures did not occur." Admiral's National Electronic Service Manager admitted that he knew these transformers were the "major source" of fires in Admiral color television sets, and the president of Admiral received reports of the fires (app. 12-17a).

It was on the basis of these facts that the Court of Appeals found, "The evidence thus demonstrated that when Admiral designed, manufactured and marketed [Mrs. Gillham's] television set it knew that the set presented a serious fire hazard." Admiral not only did nothing to warn owners or prospective purchasers of this hazard, but it misled those who inquired by informing them that the sets were safe (app. 16-17a).

Petitioner has made no showing of entitlement to review on writ of certiorari based upon the only ground available to it under Supreme Court Rule 19.1. (b). As this is a diversity case in which Ohio law applies, the sole basis for review would be that the Court of Appeals had decided an important state question in conflict with applicable Ohio law. An understanding of the pronouncements of the Ohio courts on the subject of punitive damages and the uncontradicted evidence in this case demonstrates that it was the district court which decided a question of Ohio law in a way in conflict with applicable Ohio law, and that the Court of Appeals' reversal of the district court's order is consistent with applicable Ohio law.

Quoting one fragment of the syllabus from *Smithhisler* v. *Dutter,* 157 Ohio St. 454 (1952), petitioner seeks to convince this Court, that, in reviewing the order of the district court, the Court of Appeals misinterpreted and misapplied Ohio law. Petitioner relies solely on the first paragraph of that syllabus, which states:

> 1. In tort actions, the question of punitive damages *may not ordinarily* be submitted to a jury in the absence of actual malice. (Emphasis added.)

Petitioner failed to inform this Court of the second paragraph of the syllabus from the *Smithhisler* case, which states what may ordinarily be done, in the following terms:

> 2. In an action for alienation of affections of a spouse, where the alienator's only purpose was to acquire such affections for himself and his acts in accomplishing the alienation were wrongful, unlawful and intentional and the natural and probable result of the acts was the accomplishment of the alienation, malice may be implied as a justification for an award of punitive damages.

Petitioner has also studiously avoided mentioning the following syllabus paragraph from the Ohio Supreme Court's decision in *Saberton* v. *Greenwald,* 146 Ohio St. 414 (1946):

> In an action to recover damages for a tort which involves the ingredients of fraud, malice or insult, a jury may go beyond the rule of mere compensation to the party aggrieved and award exemplary or punitive damages. (*Roberts* v. *Mason,* 10 Ohio St., 277, approved and followed.)

In *Roberts* v. *Mason,* which the *Saberton* syllabus approved and followed, the Ohio Supreme Court published the following syllabi:

1. In an action to recover damages for a tort which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages; and this they may do, although the defendant may have been punished criminally for the same wrong.
2. In such a case, the jury may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action.

Moreover, petitioner's argument is overly restrictive. The Ohio Supreme Court has recognized in a syllabus that a syllabus paragraph ". . . must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the Court." *Williamson Heater Co.* v. *Radich,* 128 Ohio St. 124 (1934). It therefore cannot be credibly asserted that statements in opinions by the Ohio Supreme Court interpreting what that court considers to be the law are without precedential value.

In the opinion in *Roberts* v. *Mason* the court made the following answer to a challenge to the propriety of punitive damage awards:

> [I]t seems to us, that if any thing can be settled by judicial decision and long and general practice, this doctrine must be regarded as thus settled . . . . The rule was distinctly recognized in Stevens v. Handly, Wright, 121, and in Simpson v. McCaffrey, 13 Ohio, 522; and ever since either of us have had any acquaintance with the jurisprudence of Ohio, the rule has been considered, so far as we know, established and elementary. If an alteration of the rule were deemed desirable, therefore, it would come more properly from the legislature than from us. But we are not prepared to recommend any such alteration. In a case of this kind, twelve intelligent and impartial men, acting under oath, and subject, in a proper case, to the control of the court, are not likely to do any great wrong; and it seems to us that the power which this rule confers upon a jury, may, in practice, operate as a salutary restraint upon the evil passions of bad men. (10 Ohio St. at 280)

Chief Justice Brinkerhoff, who delivered the opinion in *Roberts,* further elaborated upon the policy behind punitive damages in his opinion in *Atlantic & Great Western Ry. Co.* v. *Dunn,* 19 Ohio St. 162, 170 (1869):

> It rests not on the ground of abstract or theoretical justice, but on the ground of public policy — a policy which seeks to promote the public safety; to punish, through the medium of a civil proceeding, a fraudulent, malicious, insulting, or wilful wrongdoer, and to hold him up as a warning example to others, to deter them from offending in like manner.

More recently, in *Bush* v. *Kelley's, Inc.,* 18 Ohio St. 2d 89, 93 (1969), the Ohio Supreme Court reaffirmed its

position on punitive damages when it quoted with approval the rule as it is set forth in Ohio Jurisprudence 2d:

> It is an established principle of law in Ohio that in actions to recover damages for tort, which involves the ingredients of fraud, malice, or insult, or *the wanton or reckless disregard of the legal rights of others,* the jury may go beyond the rule of mere compensation of the party aggrieved, and reward exemplary or punitive damages. * * * 16 Ohio Jurisprudence 2d 281, Section 145. (Emphasis added.)

See also *Railroad Company* v. *Hutchins,* 37 Ohio St. 282 (1881); *Royal Furniture Company* v. *Weist,* 23 OCC NS 425 (1912); *Gearhart* v. *Angeloff,* 17 Ohio App. 2d 143 (1969), the syllabus of which states:

> Punitive damages may be recovered in an action for negligence *where such negligence is so gross as to show a reckless indifference to the rights and safety of other persons.* (Emphasis added.)

The latest decision of the Ohio Supreme Court regarding punitive damages is *Columbus Finance, Inc.* v. *Howard,* 42 Ohio St.2d 178 (1975), an action for wrongful execution in which punitive damages were denied because there was "absolutely no evidence from which actual malice upon the part of [the defendant] can be inferred." The court stated, however, that "This broad statement is also correct; actual malice may be inferred from conduct and surrounding circumstances." (42 Ohio St. 2d at 184)

There are several Ohio cases involving the sale of defective products in which the courts have upheld awards of punitive damages. In *Saberton* v. *Greenwald,* 146 Ohio St. 414 (1946), the Ohio Supreme Court held that it was error for a trial court to refuse to charge a jury that punitive damages might be recovered where the defendant sold

to plaintiff, as new, a wrist watch which defendant knew had been used and was defective. In support of its judgment the court adopted the rule stated in 13 Ohio Jurisprudence 235, Section 137, that punitive damages may properly be awarded where ". . . the defendant's conduct shows a wanton or reckless disregard of the legal rights of others. . . ." (146 Ohio St. at 425)

It is noteworthy, also, that in two cases Ohio courts upheld awards of punitive damages against automobile dealers who misrepresented the condition of used cars to customers. *Johnson* v. *Stackhouse Oldsmobile,* 27 Ohio St. 2d 140 (1971); *Manning* v. *Len Immke Buick,* 28 Ohio App. 2d 203 (1971).

Respondent therefore submits that the Court of Appeals was correct in determining that the law of Ohio permits a jury to award punitive damages where a defendant knowingly sells a hazardous product to a plaintiff who is injured by the known hazard. As products cases, by their nature, involve wrongdoing which exposes a multiplicity of persons to danger, the interest of the public in deterring the wrongdoer from continuing its reckless behavior is greater than it is in cases where the defendant's wrongdoing endangers only one person.

It is well settled that Ohio law permits a party who is injured by another's reckless, callous or wanton disregard for his safety to recover punitive damages. To design a color TV set knowing that it was fire hazardous, and to market it without any warning, should, in itself, support punitive damages. But, to pursue a conscious policy of concealing this hazard in the face of staggering evidence of its magnitude, thereby subjecting this respondent and countless other purchasers to the risk which devastated Mrs. Gillham, is classic outrageous behavior, reckless and callous beyond the power to gainsay. If the evidence in this case

does not support a verdict for exemplary damages and attorneys' fees, one can hardly imagine the case which would support such a verdict.

Bearing in mind that judgment n.o.v. is not to be granted if any reasonable mind can reconcile the verdict with the evidence,[2] the extreme error committed by the district court is brought into focus. In granting judgment n.o.v. for Admiral, the district court substituted its judgment for that of the jury, and held, in effect, that, as a matter of law, punitive damages are not recoverable in Ohio based upon the evidence in this case. As the Court of Appeals stated, however, the district court did not sit as the trier of the facts *de novo,* and, thus, had no right to make such a decision (app. 22a). What the district court's change of mind discloses is that that court first correctly assessed the evidence as justifying the imposition of punitive damages and so charged the jury, and, after the verdict, incorrectly reconsidered the Ohio law and vacated the verdict. The judgment of the Court of Appeals from which relief is now sought represents that Court's accord with the district court's correct original assessment of the law and the evidence.

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[2] *Leach* v. *Millers Life Insurance Co.*, 400 F.2d 179 (5th Cir. 1968); *Teti* v. *Firestone Tire And Rubber Co.*, 392 F.2d 294 (6th Cir. 1968); *Jones & Laughlin Steel Corp.* v. *Matherne*, 348 F.2d 394 (5th Cir. 1965).

II. THIS CASE PRESENTS NO FULL FAITH AND CREDIT QUESTION. THE FULL FAITH AND CREDIT CLAUSE OF ARTICLE IV REQUIRES THAT COURTS GIVE EFFECT TO THE JUDGMENTS OF STATE COURTS, AND THAT CLAUSE BEARS NO RELATIONSHIP TO THE STARE DECISIS EFFECT OF STATE COURT OPINIONS.

Petitioner offers no authority for its contention that the judgment of the Court of Appeals violates the Full Faith and Credit clause. Indeed, no such authority exists. As long ago as 1909 Justice Holmes made it clear that the Full Faith and Credit clause of Article IV applies only to state court judgments and judicial proceedings as between the parties to those proceedings. *Bagley* v. *General Fire Extinguisher Co.,* 212 U.S. 477 (1909). See also *Magnolia Petroleum Co.* v. *Hunt,* 320 U.S. 430 (1943). Nor does the statutory requirement in 28 U.S.C. § 1738 that United States courts give Full Faith and Credit to the records and judicial proceedings of state courts contain any provision supporting petitioner's argument.

Thus, even if the judgment of the Court of Appeals were arguably at variance with the body of Ohio precedent concerning exemplary damages, which it is not, this case would not present a Full Faith and Credit issue.

III. THIS CASE PRESENTS NO DUE PROCESS OF LAW QUESTION. NO BASIS EXISTS FOR THE ASSERTION THAT AN AWARD FOR PUNITIVE DAMAGES VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

In *Pizitz Dry Goods Co.* v. *Yeldell,* 274 U.S. 112 (1927), this Court stated that the imposition of a punitive damages award does not violate Due Process rights. Petitioner refers to no authority in support of its Due Process argument, and a search of the case law indicates that no such authority exists. Petitioner's endeavor to equate punitive damages with civil penalties and forfeitures is likewise unavailing. Civil penalties and forfeitures have been held to pose no threat to Due Process rights. *United States* v. *Regan,* 232 U.S. 37 (1914); *United States* v. *Zucker,* 161 U.S. 475 (1896); *Helvering* v. *Mitchell,* 303 U.S. 391 (1938); see generally 22 Am. Jur. 2d Damages § 246 (1965); Morris, *Punitive Damages in Tort Cases,* 44 Harv. L. Rev. 1173, 1195-1198 (1931).

IV. GENERAL INTEREST TO THE ENTIRE MANUFACTURING INDUSTRY, THE THIRD GROUND ADVANCED BY PETITIONER, IS NOT A BASIS FOR THE EXERCISE OF CERTIORARI JURISDICTION.

Petitioner asserts that the judgment of the Court of Appeals threatens financial disaster to the manufacturing community. Even if this contention were well considered, which it is not, it would not constitute a basis for certiorari jurisdiction. Moreover, it lies poorly with Admiral to plead that its egregious conduct should go unpunished be-

cause other manufacturers will fear similar consequences. The Court of Appeals did not in this case invent the right to recover exemplary damages. It merely applied an established principle of Ohio law. This same principle has been recognized by the courts in at least five other states.[3]

Roginsky v. *Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), cited by petitioner, is one of two similar actions seeking punitive damages against the same drug manufacturer but achieving opposite appellate results at almost the same time. The other case is *Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). In both actions juries awarded plaintiffs punitive damages on essentially the same evidence. The award in *Roginsky* was set aside by the Second Circuit. The award in *Toole* was affirmed by the California Court of Appeals.

At issue in the *Richardson-Merrell* cases was whether awards of punitive damages were supportable under New York and California law where the evidence disclosed that the company's scientists deliberately withheld clearly damaging evidence of the deleterious effects of the cholesterol-reducing drug triparanol, leading persons to develop cataracts, hair loss and flaky skin conditions. In *Roginsky* the Second Circuit reversed the award chiefly because the

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[3] Alabama: *Standard Oil Co.* v. *Gunn*, 234 Ala. 598, 176 So. 322 (1937);
California: *Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967);
Illinois: *Moore* v. *Jewel Tea Co.*, 253 N.E. 2d 636, *aff'd.* 263 N.E. 2d 103 (Sup. Ct., Ill., 1969);
Pennsylvania: *Hoffman* v. *Sterling Drug Inc.*, 485 F.2d 132 (3rd Cir. 1973);
New York: *Soucy* v. *Greyhound Corp.*, 27 App. Div. 2d 112, 276 N.Y.S. 2d 173 (1967); *Hafner* v. *Guerlain Inc.*, 34 App. Div. 2d 162, 310 N.Y.S. 2d 141 (1970).

evidence did not satisfy New York's complicity rule[4] since "there was no proof from which a jury could properly conclude that defendant's officers manifested deliberate disregard for human welfare. . . ." (378 F.2d at 850)

Upon a similar record the California Court of Appeals found sufficient evidence in the *Toole* case to support the jury inference that high level management participated in the policy of nondisclosure so as to satisfy California's complicity rule, and upheld the award of punitive damages.

In the *Richardson-Merrell* cases the manufacturer took the drug off the market and warned the public of its dangerous effects within two years after it was marketed. In this case, however, Admiral had not at the time of the trial, nine years after the fire hazardous sets were marketed, given any warning of the hazard to anyone. If Richardson-Merrell had pursued a similar policy of continuing indifference to public safety, the Second Circuit would have concluded that punitive damages were warranted in *Roginsky*. In Judge Friendly's words:

> Sufficient proof would also be furnished if, after the drug had been placed on the market, the manufacturer was shown to have become aware of the danger and to have done nothing, deliberately closing its eyes. 378 F.2d at 843.

In the *Toole* case the California court found that evidence showing that the company continued to claim that its product was safe, despite knowledge to the contrary, justified punitive damages under the California standard

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[4] Ohio has no such rule. If it had, the rule would have been no obstacle to punitive damages in this case because the evidence shows that "claims against Admiral arising from fires were circulated to and read by President Ross Siragusa, Jr., who kept some of them, and threw others away, but took no action of any kind." (app. 17a).

which provides that a corporation may be held liable for punitive damage for acts done with ill-will, motivated by actual malice, or done under circumstances amounting to fraud or oppression. Malice was deemed established by a showing of the company's reckless disregard of the safety of the public.

That the New York rule is less restrictive than the Second Circuit would lead one to believe in *Roginsky* is illustrated by the test stated by the New York Supreme Court in *Hafner* v. *Guerlain,* 34 App. Div. 2d 162, 310 N.Y.S. 2d 141 (1970), an action for compensatory and punitive damages for injuries sustained from the use of perfume. In *Hafner* the court expressed the New York standard for punitive damages as requiring proof of a conscious disregard of the rights of others, or recklessness on the part of the defendant, and referred to the New York rule regarding punitive damages generally, which was stated in *Soucy* v. *Greyhound Corp.,* 27 App. Div. 2d 112, 276 N.Y.S. 2d 173 (1967), a product liability case, in which the Supreme Court, Appellate Division said:

> We find no merit in appellant's contention that exemplary damages are not allowable in personal injury actions based on negligence if such negligence amounts to flagrant misconduct. Such has long been the well established law in this State [citation omitted] and . . . we find no constitutional barriers to the assessment of exemplary damages in civil proceedings. While an award of such damages is concededly punitive, it is in our opinion, in fact, a private remedial remedy rather than a public criminal sanction [citations omitted]. Moreover, while actual malice is a requisite to the allowance of punitive damages, such may be established . . . '. . . [also] by showing that [the act] was committed recklessly or wantonly, i.e., without regard to the rights of the plaintiff, or of peo-

> ple in general.' [citations omitted]. 276 N.Y.S. 2d at 175.

Petitioner's argument that punitive damages have no current social utility in product liability cases because the Consumer Product Safety Act[5] now operates to deter manufacturers from marketing products they know to be unsafe, is devoid of merit. There is no effective deterrent in that Act, which was enacted four years after Mrs. Gillham's fire. At any rate, the Consumer Product Safety Act has been demonstrably ineffectual in deterring Admiral which, as a matter of record evidence, gave the public no warning of the known hazard in its television sets after the Act became effective.

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[5] Public Law 92-573, enacted October 27, 1972, 15 U.S.C. §§ 2051-2081.

CONCLUSION

In its eleventh hour attempt to escape paying a judgment in a diversity case, petitioner has fabricated unsupportable theories of constitutional law and has advanced an unreasonably restrictive interpretation of Ohio law. Contrary to petitioner's assertions, the judgment of the Court of Appeals case presents no question of constitutional dimension; nor does it represent a conflict with the law of Ohio. The reversal of the district court's order was predicated solely upon the Court of Appeals' recognition that the evidence of petitioner's cruel concealment of an identifiable safety hazard in its television sets makes it impossible to reconcile the judgment n.o.v. with Ohio's criteria for awarding exemplary damages. We respectfully submit that the writ should be denied.

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